STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM JAMES LEONARD,

Defendant-Appellant.

UNPUBLISHED
November 13, 2003

No. 236871
Macomb Circuit Court
LC No. 00-000164-FH

Before: Schuette, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of solicitation of a felony, MCL 750.157b, namely, larceny over $100 under a prior version of MCL 750.356.[1] He was sentenced to two years' probation. He appeals as of right, and we affirm.

I

Defendant first asserts that his due process rights were violated by the prosecution's reissuing a warrant after the examining magistrate refused to bind defendant over on certain charges, and the circuit court dismissed other charges, no appeals were taken from these decisions, and no additional evidence was presented at the second preliminary examination. We disagree.

A

Defendant was originally charged in February 1998. The prosecutor attempted to amend the Information during the first preliminary examination to add a charge of solicitation of a felony (larceny), but the district court denied the motion, ruling that there had been insufficient proof that defendant's conversation with an undercover officer was actually a solicitation to steal goods, and there was no proof of value to reach the $100 threshold then in effect. That decision was never appealed. The district court bound defendant over for trial on two counts of receiving or concealing stolen property[2] and one count of conspiracy.[3] However, the circuit court

[1] The statute was amended by 1998 PA 311 to, among other things, raise the threshold amount for a felony to $1,000. See current MCL 750.356(3)(a).

[2] MCL 750.535.

[3] MCL 750.157a.

dismissed those charges without prejudice in August 1998, for reasons not apparent on the record before us.

The prosecutor filed new charges in July 1999, of conspiracy and solicitation of a felony (larceny). The parties stipulated that no new testimony would be offered at the preliminary examination; rather, the parties would rely on the transcript of the first preliminary examination and two transcripts of surreptitiously recorded conversations between defendant and the undercover officer (tape transcripts). After reviewing this evidence, the district court bound defendant over for trial on the solicitation charge, but not on the conspiracy charge because that charge had been dismissed and no additional evidence of conspiracy had been presented.

Upon arraignment in circuit court, defendant moved to dismiss the solicitation charge, arguing that the prosecutor had not produced "additional evidence" as required by MCR 6.110(F), and had only produced cumulative evidence. The circuit court denied the motion, finding that additional evidence of solicitation had been presented at the second preliminary examination, as required by *People v Robbins*, 223 Mich App 355; 566 NW2d 49 (1997).

B

This Court noted in *People v Vargo*, 139 Mich App 573, 578; 362 NW2d 840 (1984):

> Among the factors to be considered in determining whether a due process violation has occurred are the reinstitution of charges without additional, noncumulative evidence not introduced at the first preliminary examination, the reinstitution of charges to harass and judge-shopping to obtain a favorable ruling.

MCR 6.110(F) provides in pertinent part:

> If, after considering the evidence, the court determines that probable cause does not exist to believe either that an offense has been committed or that the defendant committed it, the court must discharge the defendant without prejudice to the prosecutor initiating a subsequent prosecution for the same offense. . . . *[T]he subsequent preliminary examination must be held before the same judicial officer and the prosecutor must present additional evidence to support the charge.* [Emphasis added.]

C

Defendant concedes that "newly discovered evidence" is not required at the subsequent preliminary examination, but argues that additional, non-cumulative evidence is required, and that in the instant case, the tape transcripts admitted at the second examination were merely cumulative to the undercover officer's testimony at the first examination. We disagree.

Assuming, arguendo,[4] that the additional evidence must be non-cumulative, we conclude that the tape transcripts here satisfied that requirement. Although Officer Brown testified at the

[4] MCR 6.110(F) requires "additional" evidence. *Vargo*, *supra*, refers to the absence of "additional, non-cumulative evidence" as one of the factors to be considered in determining (continued…)

first examination regarding what he and defendant said to each other during their encounters, that account was more general with respect to timing and content than the actual tape transcripts. The tape transcripts conveyed far more clearly that defendant affirmatively solicited the undercover officer to procure additional items, with knowledge that they would be stolen. This is not a case of an additional witness simply repeating what another witness testified to at the earlier examination. Rather, the difference between the officer's testimony and the tape transcripts went to the quality of the evidence. We conclude that the court did not err in concluding that this additional evidence was sufficient to support the bindover, and that defendant's due process rights were not violated.

II

Defendant next argues that his "particular circumstances," including his potential vulnerability, should have been considered under the objective test for entrapment. We find no error in the court's determination that defendant was not entrapped.

Defendant asserts, and the prosecutor does not contest, that he was once a confidential informant. Defendant contends that although he ceased being an official informant in 1993, when he got married, he continued to assist in the arrest and conviction of persons who attempted to sell him stolen property. He asserts that he was simply doing the same with respect to the undercover officer.

A

"The purpose of the entrapment doctrine is to deter unlawful government activities and to preclude the implication of judicial approval of impermissible government conduct." *People v D'Angelo*, 401 Mich 167, 173; 257 NW2d 655 (1977). Entrapment does not negate any element of a crime, but presents collateral facts that justify barring prosecution. *People v Jones*, 203 Mich App 384, 386; 513 NW2d 175 (1994). Thus, the defendant's guilt or innocence is irrelevant. *People v Forrest*, 159 Mich App 329, 334; 406 NW2d 290 (1987).

(…continued)

whether there has been a due process violation. The *Robbins* Court stated:

> We conclude that the lower courts erred in determining that the reinstatement of the charges against defendant violated due process because the prosecutor sought to present additional, noncumulative evidence at the second examination to the same magistrate who presided over defendant's preliminary examination. [223 Mich App at 362.]

That *Robbins* used language from *Vargo* in determining that the prosecutor had satisfied one of the *Vargo* factors is not tantamount to a holding that either the court rule, which does not use the word "non-cumulative," or due process, imposes an absolute requirement that the additional evidence be non-cumulative.

Entrapment occurs when (1) the police engage in impermissible conduct which would induce a person similarly situated to the defendant, although otherwise law-abiding, to commit the crime, or (2) the police engage in conduct so reprehensible that it cannot be tolerated. *People v Johnson*, 466 Mich 491, 498; 647 NW2d 480 (2002). The first type of entrapment exists "if the police conduct would induce a person not ready and willing to commit an offense to commit the offense; *entrapment does not exist if the conduct would induce only those persons who are ready and willing to commit the offense to do so*." *People v Fabiano*, 192 Mich App 523, 531; 482 NW2d 467 (1992) (emphasis added).

> When examining whether governmental activity would impermissibly induce criminal conduct, several factors are considered: (1) whether there existed appeals to the defendant's sympathy as a friend, (2) whether the defendant had been known to commit the crime with which he was charged, (3) whether there were any long time lapses between the investigation and the arrest, (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen, (5) whether there were offers of excessive consideration or other enticement, (6) whether there was a guarantee that the acts alleged as crimes were not illegal, (7) whether, and to what extent, any government pressure existed, (8) whether there existed sexual favors, (9) whether there were any threats of arrest, (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant, (11) whether there was police control over any informant, and (12) whether the investigation was targeted. [*Johnson, supra*, 466 Mich at 498-499.]

Under the second criterion, entrapment can be established if the police conduct is so reprehensible that it cannot be tolerated, regardless of its relationship to the crime. *Fabiano, supra* at 531-532. The furnishing of small amounts of contraband is not reprehensible per se, *People v Jamieson*, 436 Mich 61, 88; 461 NW2d 884 (1990), nor is the use of undercover agents, *People v Nixten*, 160 Mich App 203, 208; 408 NW2d 77 (1987). The mere furnishing of an opportunity to commit a crime is not entrapment. *Johnson, supra*, at 498.

The defendant has the burden of proving entrapment by a preponderance of the evidence. *Id.* The trial court's findings on the issue are reviewed under the "clearly erroneous" standard. *D'Angelo*, supra at 183.

B

Defendant argues that the police engaged in reprehensible conduct designed to induce him to commit a crime because they knew he was predisposed to go through with the transaction to help the police. He argues that the police knew that he had reported other customers who were engaged in illegal activities, and maintains that he was playing along with the undercover officer to gather information so he could report him to the police as well. When he told the officer that he would buy certain items, it was in order to obtain adequate evidence of the crime – not so he could actually purchase the stolen goods. Defendant argues that he sought items that could easily be traced to make it easier to prove the offense. The police knew that defendant regularly turned people in after conducting his own investigation, defendant argues, so the police arrested him before he reached that stage of his investigation. This, defendant argues, was reprehensible conduct.

The circuit court concluded that defendant had failed to satisfy his burden of showing entrapment under an objective test because defendant was ready and willing" to commit the charged offense when he asked Brown on multiple occasions to obtain stolen goods. The court further concluded that the police did not engage in reprehensible conduct intolerable to a civil society.

The court's finding that defendant was ready and willing to commit the crime is not clearly erroneous. State Police Lt. Kevin Denecke, who was not involved in the joint Warren/Sterling Heights investigation, testified that defendant had served as a confidential informant in the past, but that relationship ceased in 1996 because he was no longer providing information, or was unwilling to provide information, about criminal activities. Lt. Denecke testified that all confidential informants are instructed to work under a police officer's direction and control, and if they inadvertently stumble upon criminal activity, they are supposed to inform the police so they can receive instructions on how to proceed.

Further, none of the *Fabiano* factors weigh in favor of defendant:

(1) There was no appeal to defendant's sympathy as a friend.

(2) There was no evidence that defendant had been known to commit the crime with which he was charged.

(3) There was no long lapse between the activity and defendant's arrest; the investigation was centered on activities of January 29 and February 3, and he was arrested on February 3.

(4) No inducements were offered which would make the crime unusually attractive to a hypothetical law-abiding citizen. The only inducement was the profit motive someone might have when buying stolen property.

(5) There were no offers of excessive consideration or other enticement. For example, defendant was not offered a high compensation to take stolen items. Cf. *Johnson*, *supra* at 506 (comparing fees defendant would receive for providing protection during drug sales with the value of the drug transactions).

(6) The police did not assure defendant that his actions were legal. See *People v Woods*, 241 Mich App 545, 557; 616 NW2d 211 (2000) (entrapment by estoppel occurs when the police assure a defendant his conduct is legal and he reasonably and in good faith relies on that assurance). Here, the officer stated that the items had been stolen. While defendant attempted to verify whether the phones were stolen, and he received an assurance from one service provider that the phones had not been reported stolen to that particular provider, the police made no assurances that defendant was about to engage in a lawful transaction. Defendant also admitted that when he solicited the officer to bring computer supplies, he was attempting to have him steal items that were hard to steal but easy to trace. The police made no assurances that they would be obtaining such items through purely lawful means.

(7) There was no pressure exerted by the government. Although defendant argues that his place of business was visited four times, he has not shown any pressure from multiple visits.

(8) No sexual favors were offered.

(9) Defendant was not threatened with arrest as part of the investigation.

(10) The government did not engage in activities designed to escalate defendant's criminal culpability. In fact, the government merely offered defendant an opportunity to purchase a known quantity of cell phones which were represented as being stolen. Defendant escalated the activity when he solicited the officer to steal additional items. Cf. *People v Ealy*, 222 Mich App 508; 564 NW2d 168 (1997) (drug sales escalated over time).

(11) The informant in this case was considered to be the undercover officer. By definition, he acted under the control of the police.

(12) The investigation was targeted at defendant, and was not part of a fishing expedition.

The court's finding that there was no reprehensible police conduct was also adequately supported by the record. At the entrapment hearing, the undercover officer testified that he did not know that defendant had reported suspected criminal activity to the police in the past. Although defendant maintains that he was solicited three or four times to purchase stolen goods from the undercover officer, he did not report those contacts to any police agencies. The officer continued to go to defendant's store because he had been successful in selling stolen goods. The record does not support that the officer returned in order to pressure defendant into eventually relenting. Defendant's unsolicited request that Brown steal specific items has not been shown to be the product of any reprehensible conduct.

Under these circumstances, the circuit court was not obliged to accept defendant's explanation for why he bought the stolen phones and inquired about purchasing other merchandise. Lastly, we note that although the question of entrapment is one for the court - - addressed to the questions whether the police engaged in impermissible conduct that would induce an otherwise law-abiding citizen to commit the crime, or in conduct so reprehensible that it should not be tolerated - - here, the nature of defendant's entrapment defense was such that it challenged an element of the crime, intent. Thus, defendant was also able to present this defense to the jury, which also rejected it.

Affirmed.

/s/ William D. Schuette
/s/ Mark J. Cavanagh
/s/ Helene N. White